# In the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-754

THE B. F. GOODRICH COMPANY, ET AL.,
*Petitioners,*

v.

DEPARTMENT OF TRANSPORTATION, ET AL.,
*Respondents,*

PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## Petitioners' Reply to Respondents' Brief in Opposition to Petition for a Writ of Certiorari

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Petitioners file this reply to the Respondents' Brief in Opposition to the Petition for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit because (1) the conflict among the Circuits called to the attention of the Court in the Petition has been reinforced by a subsequent decision of the District of Columbia Circuit; (2) contrary to respondents' contention, both the National Highway Traffic Safety Administration and the Sixth Circuit relied

in upholding this Regulation upon information which was never made a part of this record and upon which petitioners were denied the right to comment during the rulemaking process; and (3) respondents have misconstrued important principles for judicial review of administrative action established by this Court and followed by other Circuits.

**1. The Conflict Among the Circuits Has Been Reinforced by a Subsequent Decision of the District of Columbia Circuit.**

Respondents make no real effort to deal with the clear conflict between the decision of the Sixth Circuit here and that of the District of Columbia Circuit in *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974), saying only in a footnote that *Portland* is "consistent" with the "general principles governing informal rulemaking," and that these principles are a "far cry" from petitioners' insistence that "every bit of data" utilized by an agency in rulemaking be made available for comment by interested parties. (R. Br. 10, fn. 11, 11).

Petitioners do not urge this Court to take this case for the purpose of establishing any rule of the kind respondents maintain is presented by this case. As petitioners made clear in their Petition, the rule which petitioners contend for here is not one which would require agencies to make "every bit of data" available for comment, but one which simply measures the duty of an agency to disclose materials for comment during rulemaking by what that agency feels compelled to submit later to a reviewing court in support of any regulation resulting from that rulemaking process, as held by the District of Columbia Court of Appeals in *Portland*.



Any doubts as to whether a conflict exists between the District of Columbia Circuit under the *Portland Cement* doctrine and the Sixth Circuit under the ruling in the present case should have been completely dispelled by the District of Columbia Circuit's more recent decision in *National Asphalt Pavement Ass'n v. Train*, 539 F.2d 775 (D.C. Cir. 1976). For in *National Asphalt*, the District of Columbia Circuit, in rejecting a claim by the rulemaking agency that discussions with agency personnel prior to issuance of proposed standards provided interested parties with sufficient notice and opportunity for comment, ruled that under the doctrine of *Portland Cement*, "in order to have a 'meaningful' opportunity for comment, one must be aware of the information the agency *finally decides to rely on in taking agency action.*" 539 F.2d at 779, fn. 2. (Emphasis added). In the present case, the Sixth Circuit endorsed procedures pursuant to which petitioners did not know what the agency had finally decided to rely upon until well after the regulation had issued and petitioners had filed their appeal with the Sixth Circuit.

**2. Both the National Highway Traffic Safety Administration and the Sixth Circuit Relied Upon Information Which Was Not Made a Part of the Rulemaking Record and Upon Which Petitioners Had No Opportunity to Comment.**

Respondents spend half their brief attempting to persuade this Court that even though this agency deliberately added technical data and other information to the administrative docket on and after the day this regulation was issued, supplied additional data and information directly to the Court of Appeals upon review, and then cited and relied upon numerous items of such material in their briefs to the Court of Appeals, the agency did not really rely upon such information and data in getting the major por-

tion of this regulation sustained in the Court of Appeals.[1] Respondents then argue that even though the Court of Appeals admittedly cited and relied upon various items of such data and information in its opinion, the Court of Appeals, too, did not really rely upon such material in reaching its decision. To perform these extraordinary mental gymnastics respondents are forced to claim that the non-record material cited by the agency in its briefs, and by the Court of Appeals in its opinion, were "submitted not as substantial evidence . . . but in response to specific arguments (R. Br. 6)," or "merely summarized and illustrated the Government's contentions" (R. Br. 6), or were treated by the reviewing court "as an explication, not as record evidence" (R. Br. 7).

These contrived and euphemistic descriptions of how both the agency and the Court resorted to these non-record materials in supporting this regulation serve only to emphasize the extent to which such materials were, in fact, used by both the agency and the reviewing court. Respondents' strained explanations, moreover, serve to demonstrate how essential it is that this Court grant certiorari and overturn the Sixth Circuit's "background information-versus-basic data" rule, which will lead to just the sort of uncertainty and argument concerning what a reviewing court may or may not rely upon in upholding a regulation, in favor of a simple rule, followed by the

[1] There is no merit to respondents' claim that petitioners, by agreeing that respondents could file a supplemental appendix below, somehow should have expected that the supplemental appendix would contain materials which had never been made part of the administrative record. There is no claim in respondents' brief that the cited agreement included permission to respondents to place in the supplemental appendix anything beyond materials from the administrative record which had not been printed in the original appendix. There can be no such claim because there was no such agreement.



District of Columbia Circuit and other Circuits, which simply requires that the materials which a rule-making agency may furnish a reviewing court in defense of a regulation may not go beyond those materials which the agency has earlier made part of the administrative record and made available for comment during the rule-making process.

Respondents' only specific rebuttal, which is a contention that petitioners were given ample opportunity to comment upon lead-time information because of a July, 1974 briefing by the agency (R. Br. 5), completely ignores the fact that the critical lead-time data relied upon by the agency and the Sixth Circuit were never disclosed during that briefing, and, after being placed in the administrative record the day the regulation issued, were relied on by the agency to claim a treadwear course capacity quadruple that presented in a written analysis by the agency which had been placed in the administrative record subsequent to the briefing. (V Jt. App. 1624). Respondents also fail to deal with the fact that the agency, after the Regulation was under review in the Sixth Circuit, considered it necessary to present additional technical papers and affidavits in support of the Regulation, including one technical paper essential to upholding the temperature-resistance segment of the Regulation. (Pet., p. 9).

### 3. The Sixth Circuit's Decision Is in Conflict with Principles Announced by this Court Which Have Been Applied by Various Courts of Appeals to Informal Rulemaking.

In their Petition, petitioners cited decisions of this Court in *Camp v. Pitts*, 411 U.S. 138, 142 (1973), *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972), *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971), and *SEC v. Chenery Corp.*,

318 U.S. 80, 87 (1943), as having articulated principles of judicial review of agency action with which the Sixth Circuit's decision is in conflict. Respondents have refused to deal directly with any of these decisions, and have confined themselves to a general observation that petitioners' approach "would undermine the fundamental difference" between administrative adjudication and informal rulemaking. (R. Br. 9). Respondents' contention, however, simply serves to underscore another important reason why certiorari should be granted, and that is to permit this Court to make clear, as a number of Circuits have ruled, that certain basic principles articulated in cases from this Court which have involved administrative adjudication are by their nature fully applicable to informal rulemaking as well.

The decisions of this Court cited in the petition dealt with the general duty of an agency to allow persons participating in agency proceedings a fair opportunity to respond to evidentiary material which an agency intends to use in taking action affecting such persons, and with the general unfairness of allowing an agency to justify its action upon judicial review by resort to reasons or evidence not offered by the agency on the record of its proceedings. In the case of both administrative adjudicatory proceedings and administrative rulemaking, affected parties have an unquestioned right to place evidence and argument into an agency record, and to respond to the agency's positions and evidence on that record. The fact that there is a broader and more formal array of evidentiary devices available for these purposes in adjudicatory proceedings does not make these general principles, and the rulings of this Court in the above cases, any less applicable to administrative rulemaking. Indeed, if there is some question about these principles being applicable to rulemaking, that is a matter of utmost importance to administrative law



and due process, and this Court should grant certiorari for the purpose of resolving that very question.

Most importantly, whatever respondents' position on the applicability of these decisions of the Court to judicial review of administrative rulemaking, the plain fact is that a number of the Circuits have cited these cases and have applied their principles in reviewing administrative rulemaking. These Circuits have, accordingly, reached decisions in this area contrary to the decision of the Sixth Circuit in the present case.

Typical is the decision of the Third Circuit in *Dry Color Mfrs. Ass'n v. Department of Labor*, 486 F.2d 98 (3d Cir. 1973), cited by petitioners in their petition but not dealt with by respondents in their brief. In *Dry Color*, the court, in invalidating certain temporary emergency standards issued by OSHA for the control of carcinogens, refused to permit the agency to rely upon a scientific report, which the court stated would have provided an adequate basis for the regulation, because "the report is not part of the record, and there is no evidence in the published notice . . . that this report was relied on." 486 F.2d at 104. Even though the regulation at issue was a temporary emergency standard with respect to which the right of comment was made inapplicable by statute, 486 F.2d at 101, the Third Circuit concluded that its decision was mandated by general principles of agency law announced by this Court in the *Citizens to Preserve Overton Park* and *Allegheny-Ludlum* cases and by this Court's decision in *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962):

> "It has long been settled that in reviewing an agency action and the adequacy of an agency's articulation of its action, including findings of fact and reasoning processes, courts must look to the record that was considered by the agency and to the factual findings and reasoning of the agency – not to *post*

*hoc* rationalizations of counsel or even agency members and not to evidentiary materials that were not considered by the agency. *See, e.g.,* Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, 419, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971); N.L.R.B. v. Metropolitan Life Ins. Co., 380 U.S. 438, 443-444, 85 S.Ct. 1061, 13 L.Ed.2d 951 (1965); Burlington Truck Lines v. United States, 371 U.S. 156, 168-169, 83 S.Ct. 239, 9 L.Ed2d 207 (1962). Furthermore, where, as here, the statute authorizing the agency action specifically requires that such action be supported 'by substantial evidence *in the record* considered as a whole', it is clear that OSHA may not go beyond the record in promulgating a standard or in supporting a standard in any subsequent judicial review. *Cf.* United States v. Allegheny-Ludlum Steel, 406 U.S. 742, 756-757, 92 S.Ct. 1941, 32 L.Ed.2d 453 (1972). 486 F.2d at 104, n. 8.

Similarly, in *South Terminal Corp. v. Environmental Protection Agency,* 504 F.2d 646 (1st Cir. 1974), a case cited by the respondents in their earlier brief opposing petitioners' stay motion to this Court, the First Circuit relied upon the *Overton Park* and *Camp v. Pitts* decisions in remanding a regulation to the rulemaking agency to permit interested parties to comment upon test data which the agency had placed in the agency record only after the regulation had issued. 504 F.2d at 665. The First Circuit refused to permit use of this test report upon judicial review, even though the agency had placed the report "in the record," because the report "was published after the plan was announced and interested parties have not had an opportunity to criticize the findings." 504 F.2d at 664.

The Second and Seventh Circuits, relying upon this Court's decision in *Burlington Truck Lines, Inc. v. United States, supra,* have each refused to permit rulemaking agencies to defend regulations upon judicial review on the



basis of technical data or technical claims presented to the reviewing court in the first instance. In *Hooker Chemicals & Plastics, Corp. v. Train,* 537 F.2d 620, 634 (2d Cir. 1976), the Second Circuit refused to permit the EPA to rely upon technology not contained in the agency record, citing the *Burlington Truck Lines* case and saying that "courts have repeatedly held that this kind of *post hoc* rationalization is plainly unacceptable." 537 F.2d at 634. And in *American Meat Institute v. Environmental Protection Agency,* 526 F.2d 442, 465 (7th Cir. 1975), the Seventh Circuit refused to entertain claims of the transferability of certain existing technology to the regulated industry where such supporting information had not been set forth in the agency record, on the ground that, under the *Burlington Truck Lines* decision,[2] a court reviewing agency rulemaking "cannot sustain the regulation on the basis which counsel now asserts but which the agency did not rely upon in formulating the regulation." 526 F.2d at 465.

The Sixth Circuit's decision in the present case, is in serious conflict with other Circuits with respect to the important question of what a rulemaking agency may properly present to a reviewing court in defense of its regulations. The conflict, serious enough in itself, stems from an even more basic disagreement over the applica-

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[2] Another decision of this Court entered in a case involving agency adjudication which is highly relevant to judicial review of agency rulemaking is *Bowman Transportation Inc. v. Arkansas-Best Freight System Inc.,* 419 U.S. 281 (1974). In that case, this Court said:

> "A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." 419 U.S. at 288, n. 4.

bility to administrative rulemaking of fundamental principles of agency law and due process which have been announced by this Court in cases which have largely involved administrative adjudication. In recent years, it is fair to say, administrative rulemaking has become a far more significant and pervasive form of government regulation than administrative adjudication. It is important that this Court grant certiorari in order to clarify the extent to which these fundamental principles, which the Court has consistently applied to the administrative adjudicatory process, are applicable to the now more important process of administrative rulemaking.

Respectfully submitted,

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